

1 **UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF SOUTH CAROLINA**
3 **AIKEN DIVISION**

4
5

UNITED STATES OF AMERICA,

6 Plaintiff,

7 v.

8 NORFOLK SOUTHERN RAILWAY
9 COMPANY,

10 Defendant.
11

Case No. 1:08-cv-01707-MBS

AMENDED COMPLAINT

12 The United States of America, by the authority of the Attorney General of the
13 United States and through the undersigned attorneys, acting at the request of the
14 Administrator of the United States Environmental Protection Agency (“EPA”), files this
15 amended complaint and alleges as follows:

16 **NATURE OF THE ACTION**

17 1. This is a civil action brought against the Norfolk Southern Railway
18 Company (“Defendant”) seeking injunctive relief and assessment of civil penalties for
19 violations of the Clean Water Act, 33 U.S.C. §§ 1251–1387 (“CWA”), for the discharge
20 of chlorine and oil into navigable waters of the United States, and of the Comprehensive
21 Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601–9675(c)
22 (“CERCLA”) for failure to immediately notify the National Response Center of a
23 reportable release of chlorine.

24 **JURISDICTION, AUTHORITY AND VENUE**

25 2. This Court has jurisdiction over the subject matter of this action pursuant to
26 28 U.S.C. §§ 1331, 1345 and 1355; Sections 309(b), 311(b)(7)(E) and 311(n) of the
27 CWA, 33 U.S.C. §§ 1319(b), 1321(b)(7)(E) and 311(n); and Section 113(b) of CERCLA,
28 42 U.S.C. § 9613(b).

3. Authority to bring this action is vested in the United States Department of Justice by Section 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

4. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1395(a); Sections 309(b) and 311(b)(7)(E) of the CWA, 33 U.S.C. §§ 1319(b) and 1321(b)(7)(E); and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), because Defendant does business in this District and the alleged violations occurred in this District.

DEFENDANT

5. Defendant Norfolk Southern Railway Company is a corporation organized and existing under the laws of the Commonwealth of Virginia. Defendant is a subsidiary of the Norfolk Southern Corporation.

STATUTORY BACKGROUND

6. Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), prohibits the discharge of oil or hazardous substances into or upon the navigable waters of the United States or adjoining shorelines in such quantities as the President determines may be harmful to the public health or welfare or the environment of the United States.

7. Pursuant to Sections 311(b)(2)(A) and (b)(4) of the CWA, 33 U.S.C. §§ 1321(b)(2)(A) and (b)(4), EPA, acting through its delegated authority under Executive Order No. 11735, 38 Fed. Reg. 21243 (Aug. 7, 1973), has determined by regulation that chlorine is a hazardous substance with a reportable quantity of 10 pounds for purposes of Section 311 of the CWA. 40 C.F.R. §§ 116.4 and 117.3.

8. Pursuant to Section 311(b)(4) of the CWA, 33 U.S.C. § 1321(b)(4), EPA, acting through its delegated authority under Executive Order No. 11735, 38 Fed. Reg. 21243 (Aug. 7, 1973), has determined by regulation that the quantities of oil that may be harmful to the public health or welfare or the environment of the United States include discharges of oil that, inter alia, cause a film or sheen upon or discoloration of the surface of the water. 40 C.F.R. § 110.3.

9. Pursuant to Section 311(b)(7)(A) of the CWA, 33 U.S.C. § 1321(b)(7)(A), and the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note,

1 as implemented at 69 Fed. Reg. 7,121 (Feb. 13, 2004), any person who is the owner or
2 operator of an onshore facility from which oil or a hazardous substance is discharged in
3 violation of Section 311(b)(3) of the CWA shall be subject to a civil penalty of up to
4 \$32,500 per day or up to \$1,100 per barrel of oil or unit of reportable quantity of a
5 hazardous substance discharged. 40 C.F.R. § 19.

6 10. Pursuant to Section 311(b)(7)(D) of the CWA, 33 U.S.C. § 1321(b)(7)(D),
7 and the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note,
8 as implemented at 69 Fed. Reg. 7,121 (Feb. 13, 2004), the owner or operator of an
9 onshore facility whose gross negligence or wilful misconduct results in a violation of
10 Section 311(b)(3) of the CWA shall be subject to a civil penalty of not less than \$130,000
11 and not more than \$4,300 per barrel of oil or unit of reportable quantity of a hazardous
12 substance discharged. 40 C.F.R. § 19.

13 11. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of
14 any pollutant by any person except as in compliance with the CWA. Section 502 of the
15 CWA defines “discharge of a pollutant” as any addition of any pollutant to navigable
16 waters from any point source, 33 U.S.C. § 1362(12); “point source” as any discernible,
17 confined and discrete conveyance, including containers and rolling stock, from which
18 pollutants are or may be discharged, 33 U.S.C. § 1362(14); and “navigable waters” as the
19 waters of the United States, 33 U.S.C. § 1362(7).

20 12. Pursuant to Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b)
21 and (d), EPA is authorized to bring a civil action seeking appropriate injunctive relief and
22 civil penalties for violations of Section 301 of the CWA.

23 13. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), requires any person in
24 charge of an onshore facility, as soon as he has knowledge of a release of a hazardous
25 substance from that facility in reportable quantities, to immediately notify the National
26 Response Center of that release.

27 14. Pursuant to Section 109(c)(1) of CERCLA, 42 U.S.C. § 9609(c)(1), and the
28 Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as

1 implemented at 69 Fed. Reg. 7,121 (Feb. 13, 2004), a civil penalty of up to \$32,500 per
2 day for violations occurring on or after March 16, 2004, may be assessed for each
3 violation of Section 103(a) of CERCLA. 40 C.F.R. § 19.

4 **GENERAL ALLEGATIONS**

5 15. Defendant owns and operates a freight railroad, with approximately 21,200
6 miles of track in 22 eastern states, the District of Columbia, and Canada. Defendant also
7 owns and/or operates trains, including engines and tank cars, that operate on its track.

8 16. Defendant owns and operates tracks that pass through Graniteville, South
9 Carolina. Defendant also owns and/or operates trains, including engines and tank cars,
10 that operate on the portions of its track that pass through Graniteville. Graniteville is
11 located within the unsignaled or “dark” territory of Defendant’s rail system, in which
12 tracks are equipped with no automated warning system that would notify engineers of
13 upcoming track conditions such as improperly lined switches.

14 17. At 2:39 a.m. on January 6, 2005, Norfolk Southern Train 192 (“Train 192”)
15 was traveling through Graniteville at approximately 47 miles per hour when it
16 encountered an improperly lined switch that diverted it from the main line onto an
17 industrial siding, where the train collided head on with Norfolk Southern Train P-22
18 (“Train P-22”), which was parked and unoccupied at the time of the collision.

19 18. The collision derailed both of Train 192’s locomotives as well as 16 of its
20 42 freight cars. Among the derailed cars were three tank cars containing pressurized
21 chlorine in a liquid state.

22 19. One of the tank cars containing chlorine was breached during the accident.
23 The breached tank car discharged chlorine.

24 20. Approximately 60 tons (120,000 pounds) of chlorine discharged from the
25 breached tank car.

26 21. Chlorine discharged from the breached tank car in a liquid and/or gaseous
27 state. Upon discharge from the breached tank car, the chlorine rapidly assumed a gaseous
28 state.

1 22. Chlorine gas is heavier than air. Accordingly, the discharged chlorine
2 formed a cloud that settled over the derailment site and surrounding areas of lower
3 elevation.

4 23. Chlorine discharged from the breached tank car killed Train 192's engineer
5 and eight other people in surrounding buildings and homes. The discharged chlorine also
6 caused hundreds of cases of respiratory distress and required the evacuation of over 5,400
7 people living or working in the vicinity of the derailment site.

8 24. Chlorine discharged from the breached tank car settled upon and was
9 absorbed into Horse Creek, its tributaries and their adjoining shorelines, in quantities
10 sufficient to injure and kill fish (some of which were visibly bleached), other aquatic life
11 and vegetation, and significantly lower pH levels in receiving waters.

12 25. In November 2005, EPA issued an Information Request to Defendant under
13 Sections 308 and 311 of the CWA. In its March 13, 2006 response, Defendant addressed
14 the presence of chlorine in Horse Creek, explaining as follows:

15 Monitoring of surface water conditions were determined to be warranted
16 based on a strong odor SCDHEC [South Carolina Department of Health and
17 Environmental Control] had noted in the area of the creek and initial
18 SCDHEC water sample results indicating a lower than normal pH and
19 elevated chlorine. Elevated chlorine air monitoring readings were also
20 detected near Horse Creek by [Defendant's contractor] CTEH. CTEH
21 initiated a water monitoring program in the early morning of January 8 for
22 chlorine and pH. Initial inspection of the storm water outfall into the creek
23 and 100 yards downstream on that day evidenced odor and detectable
24 concentrations of chlorine in the air. Respiratory protection was required in
the vicinity of the storm water outfall behind the plant. Due to the
continuing emergency response to the air release and concern for the safety
of personnel entering the work zone, water sampling was limited, but test
strips indicated elevated chlorine and low pH values at that point in Horse
Creek. It should be noted that these field measurements were qualitative,
not quantitative, and cannot be relied upon to determine reportable quantity.
Several dead fish with an appearance consistent with chlorine exposure
were noted in the creek.
(Response to November 23, 2005 Information Request, p. 8).

25 26. The United States does not know at this time the precise geographical
26 extent reached by the chlorine gas cloud discharged from the breached tank car.
27 However, chlorine gas reached waters downstream of the point where Horse Creek flows
28 into Flat Rock Pond, and upstream of Langley Pond, and chlorine entered waters within

1 this area. These waters include (but may not be limited to) Horse Creek, Flat Rock Pond,
2 Bridge Creek Pond, and the canal draining Bridge Creek Pond.

3 27. During the collision the fuel tank on Train 192's second engine ruptured and
4 the fuel tank on Train P-22's engine was punctured by debris. The two breached fuel
5 tanks discharged between 2,500 and 3,500 gallons of diesel fuel. Discharged diesel fuel
6 absorbed into soils and surfaces surrounding the derailment site.

7 28. On January 15, 2005, a rainbow sheen was observed by Defendant on the
8 surface of water flowing from a storm drain into Horse Creek. This sheen on the water
9 was caused by diesel fuel discharged from Defendant's engines following the derailment,
10 which was flushed into Horse Creek when Defendant broke a water line while conducting
11 remedial activities related to the derailment.

12 29. In its March 13, 2006 response to EPA's Information Request, Defendant
13 addressed the discharge of diesel fuel, explaining as follows:

14 The amount of diesel fuel spilled from the fuel tanks of locomotive #6653
15 and 4622 onto the ground as a result of the accident has been estimated by
16 the railroad to be between 2,500 and 3,500 gallons. . . . [A]t the time of the
17 incident (and for nine days thereafter) no oil or oil sheen was observed in
any storm drain or in the water until the January 15 rainbow sheen incident
was observed as described below. . . .

18 Earlier that same day [January 15, 2005] a slight rainbow sheen was
19 observed at a storm drain outfall located upstream of Station 6 (behind the
20 plant's above ground storage tanks and where the road crosses the creek
21 over a bridge). Notice of the sheen was given immediately to agency
22 representatives present on location. This sheen was tracked back to another
23 smaller water line break which had occurred the day before during the
24 equipment operation along the industrial track approximately 100 feet
25 northwest of the central excavation and which had drained northwest
through the small spill area at the grade crossing. It was determined that
this water line break had moved a small amount of fuel impacted water in
the ground to an old storm drain through subsurface infiltration (not through
a surface inlet), resulting in a small rainbow sheen reaching the creek at the
above mentioned outfall. . . . The sheen discharge to the creek was stopped
by removal of the impacted soil at the site and repair of the water line.
(Response to November 23, 2005 Information Request, pp. 10-12).

26 30. At all times pertinent to this action, Defendant was a "person" within the
27 meaning of Sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7) and
28 1362(5), and Section 101(21) of CERCLA, 33 U.S.C. § 9601(21).

1 31. At all times pertinent to this action, Defendant was the owner and/or
2 operator of Trains 192 and P-22, including all engines and tank cars, within the meaning
3 of Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6).

4 32. At all times pertinent to this action the engines and tank cars of Trains 192
5 and P-22 were “onshore facilities” within the meaning of Section 311(a)(10) of the CWA,
6 33 U.S.C. § 1321(a)(10), and Section 101(18) of CERCLA, 42 U.S.C. § 9601(18), and
7 “point sources” within the meaning of Section 502(14) of the CWA, 33 U.S.C.
8 § 1362(14).

9 33. Horse Creek is a perennial water body, is habitat for fish and other aquatic
10 life, and is used for fishing.

11 34. Horse Creek flows through the town of Graniteville, entering Flat Rock
12 Pond to the north of the derailment site. Horse Creek continues from the southern end of
13 Flat Rock Pond. Some water from Flat Rock Pond is diverted a short distance to Bridge
14 Creek Pond, which drains to a canal (used for mill operations) that ultimately returns
15 diverted water to Horse Creek. Horse Creek flows within approximately 1,000 feet of the
16 derailment site. South of the derailment site, Horse Creek passes through Langley Pond,
17 and from there flows to the Savannah River, which flows to the Atlantic Ocean.

18 35. Portions of Horse Creek, both upstream and downstream of the derailment
19 site, were historically used for commercial purposes, including the transportation of
20 timber, and to power water-driven turbines at mills located along Horse Creek.

21 36. Horse Creek, Flat Rock Pond, Bridge Creek Pond, and the canal draining
22 Bridge Creek Pond are “navigable waters of the United States” within the meaning of
23 Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3); and “navigable waters” within
24 the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

25
26 **FIRST CLAIM FOR RELIEF**
27 **(Discharge of Chlorine in Violation of Section 311(b)(3) of the CWA)**

28 37. Paragraphs 1 through 36 are realleged and incorporated herein by reference.

1 38. Chlorine is a “hazardous substance” within the meaning of Section 311 of
2 the CWA. 33 U.S.C. § 1321(a)(14); 40 C.F.R. § 116.4.

3 39. Defendant’s release of chlorine from Train 192’s breached tank car, which
4 reached Horse Creek and other waters as alleged above, was a “discharge” within the
5 meaning of Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2).

6 40. The United States has not yet determined the maximum quantity of chlorine
7 that reached navigable waters and adjoining shorelines, but on January 6, 2005, more than
8 10 pounds of chlorine reached and was absorbed into navigable waters including, but not
9 necessarily limited to, Horse Creek, Flat Rock Pond, Bridge Creek Pond, and the canal
10 draining Bridge Creek Pond.

11 41. Defendant discharged chlorine in excess of the reportable quantity of 10
12 pounds into or upon navigable waters and adjoining shorelines in violation of Section
13 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3). Defendant is accordingly liable for a
14 civil penalty of up to \$32,500 per day of violation or an amount up to \$1,100 per unit of
15 reportable quantity of chlorine discharged. 33 U.S.C. § 1321(b)(7)(A). To the extent that
16 Defendant’s discharge of chlorine was the result of gross negligence or wilful
17 misconduct, Defendant is liable for a civil penalty of not less than \$130,000 and not more
18 than \$4,300 per unit of reportable quantity of chlorine discharged. 33 U.S.C.
19 § 1321(b)(7)(D).

20
21 **SECOND CLAIM FOR RELIEF**
(Discharge of Oil in Violation of Section 311(b)(3) of the CWA)

22 42. Paragraphs 1 through 36 are realleged and incorporated herein by reference.

23 43. Diesel fuel is “oil” within the meaning of CWA Section 311(a)(1),
24 33 U.S.C. § 1321(a)(1).

25 44. The release of diesel fuel from the engines of Train 192 and P-22 that
26 occurred as a result of the collision on January 6, 2005 was a “discharge” within the
27 meaning of Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2).
28

1 45. A sheen was observed by Defendant on the surface of Horse Creek on
2 January 15, 2005. The sheen was caused by diesel fuel discharged as a result of the
3 collision. The diesel fuel was flushed from fuel soaked soil in the vicinity of the
4 derailment site and into Horse Creek when Defendant broke a water line while
5 conducting remedial activities related to the derailment.

6 46. Defendant discharged oil into or upon Horse Creek in a quantity sufficient
7 to cause a sheen upon or discoloration of the surface of the water in violation of Section
8 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3). Defendant is accordingly liable for a
9 civil penalty of up to \$32,500 per day of violation or an amount up to \$1,100 per barrel of
10 oil discharged. 33 U.S.C. § 1321(b)(7)(A). To the extent that Defendant's discharge of
11 oil was the result of gross negligence or wilful misconduct, Defendant is liable for a civil
12 penalty of not less than \$130,000 and not more than \$4,300 per barrel of oil discharged.
13 33 U.S.C. § 1321(b)(7)(D).

14
15 **THIRD CLAIM FOR RELIEF**
16 **(Discharge of Pollutants in Violation of Section 301(a) of the CWA)**

17 47. Paragraphs 1 through 36 are realleged and incorporated herein by reference.

18 48. Chlorine is a "pollutant" within the meaning of Section 301(a) of the CWA,
19 33 U.S.C. § 1311(a).

20 49. Defendant's release of chlorine from Train 192's breached tank car, which
21 reached Horse Creek and other waters as alleged above, was a "discharge of [a] pollutant"
22 within the meaning of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

23 50. Diesel fuel is a "pollutant" within the meaning of Section 301(a) of the
24 CWA, 33 U.S.C. § 1311(a).

25 51. Defendant's release of diesel fuel from the engines of Train 192 and P-22,
26 which reached Horse Creek as alleged above, was a "discharge of [a] pollutant" within
27 the meaning of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

28 52. Defendant discharged chlorine and diesel fuel from point sources into
navigable waters in violation of Section 301(a) of the CWA, 33 U.S.C. 1311(a).

1 Defendant is accordingly subject to appropriate injunctive relief pursuant to Section
2 309(b) of the CWA, 33 U.S.C. § 1319(b).

3 **FOURTH CLAIM FOR RELIEF**
4 **(Failure to Immediately Notify the National Response Center of a Release of**
5 **Chlorine in Reportable Quantities in Violation of Section 103(a) of CERCLA)**

5 53. Paragraphs 1 through 36 are realleged and incorporated herein by reference.

6 54. At all times pertinent to this action Defendant was a “person in charge” of
7 Train 192 and its tank cars within the meaning of Section 103(a) of CERCLA, 42 U.S.C.
8 § 9603(a).

9 55. Chlorine is a hazardous substance with a reportable quantity of 10 pounds
10 for purposes of Section 103(a) of CERCLA. 40 C.F.R. § 302.4.

11 56. The discharge of chlorine from Train 192's breached tank car was a
12 “release,” as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), in excess of
13 10 pounds.

14 57. Defendant knew, shortly after the 2:39 a.m. collision of Train 192 with
15 Train P-22 on January 6, 2005, that more than 10 pounds of chlorine had been released.

16 58. Defendant did not notify the National Response Center of the release until
17 approximately 4 a.m. on January 6, 2005.

18 59. Defendant did not immediately notify the National Response Center as soon
19 as it had knowledge that a release of chlorine in excess of 10 pounds from one of Train
20 192's tank cars had occurred, in violation of Section 103(a) of CERCLA, 42 U.S.C.
21 § 9603(a). Defendant is accordingly liable for a civil penalty of up to \$32,500 per day of
22 violation. 42 U.S.C. § 9609(c)(1).

23 **PRAYER FOR RELIEF**

24 WHEREFORE, based upon all the allegations set forth above, the United States of
25 America requests that this Court:

26 1. Impose civil penalties on Defendant, pursuant to Section 311(b)(7) of the
27 CWA, in an amount of up to \$1,100 per unit of reportable quantity of chlorine discharged,
28

1 and to the extent the discharge was the result of gross negligence or wilful misconduct by
2 the Defendant, of up to \$4,300 per unit of reportable quantity of chlorine discharged;

3 2. Impose civil penalties on Defendant, pursuant to Section 311(b)(7) of the
4 CWA, in an amount of up to \$1,100 per barrel of oil discharged, and to the extent the
5 discharge was the result of gross negligence or wilful misconduct by the Defendant, of up
6 to \$4,300 per barrel of oil discharged;

7 3. Impose appropriate injunctive relief pursuant to Section 309(b) of the CWA
8 as may be necessary to prevent, detect and mitigate further discharges in violation of
9 Section 301(a) of the CWA;

10 4. Impose a civil penalty on Defendant in an amount of up to \$32,500 per day
11 of violation for failure to immediately notify the National Response Center of a reportable
12 release of chlorine in violation of Section 103(a) of CERCLA; and

13 5. Grant such other and further relief as the Court deems just and proper.
14

15 Respectfully submitted,

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